Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAVID KNIERIEM, as personal representative of the Estate of Troy Siade, deceased,

Petitioner,

vs.

GROUP HEALTH PLAN, INC., and BERNARD MANSHEIM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3)(B), a participant in an employee benefit plan may seek "other appropriate equitable relief." The question presented is whether a participant, who dies while attempting to seek injunctive relief to require a plan to pay for a medical procedure covered by the plan that could have saved his life, may then have his estate seek restitution or surcharge from the plan administrator as a breaching fiduciary for the cost of that medical procedure pursuant to 29 U.S.C. § 1132(a)(3)(B).

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OPINION BELOW

The opinion below by the United States Court of Appeals for the Eighth Circuit is reported at 434 F.3d 1058 (2006). The Eighth Circuit affirmed the unpublished judgment of the District Court that was entered on December 6th, 2004.

JURISDICTION

The Eighth Circuit filed its decision on January 19th, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

29 U.S.C. § 1132(a)

A civil action may be brought –

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

STATEMENT OF FACTS

Group Health Plan (hereafter the respondents will be referred to singularly and collectively as "GHP") insured Troy Siade ("decedent") under a health insurance plan.

Decedent, a 38 year old attorney, had been diagnosed with non-Hodgkin's lymphoma. Decedent had been advised by his health care providers that he must undergo a procedure known as allogeneic stem cell transplantation; specifically, that no other therapy offered the decedent an opportunity for a long-term disease-free survival. The undisputed evidence at a hearing on the preliminary injunction established this procedure would cost at least hundreds of thousands of dollars. Decedent subsequently died as a result of not having this procedure.

The health insurance policy issued by GHP provided coverage for this procedure; in fact, GHP had previously approved an almost identical procedure for coverage for the decedent, and had approved the necessary preliminary work for this procedure, including approving the necessary type-matching to locate a donor. GHP denied coverage for this procedure on the basis that it was "investigational and unproven," and therefore excluded by the policy. Respondent Mansheim, the Chief Medical Officer of Coventry Health Care, the parent corporation of GHP, was the individual who actually made this decision.

There was no attempt by GHP to establish whether this decision conformed with the definition of "Experimental, Investigational, and Unproven" established in the policy. Mansheim stated he did not use the definition set forth in the insurance policy, but instead the definition he established for the parent corporation.

GHP had a corporate policy of treating transplants differently than other medical procedures. Mansheim stated he would have denied both an autologous and allogeneic[1] stem cell transplant for the decedent for the same reason – that it was an experimental procedure. Yet the autologous stem cell transplant was approved for the decedent by Mansheim, as well as the search for a donor for the allogeneic procedure. The only difference between the two procedures for decedent was that the autogolous procedure would not work as well, while the allogeneic procedure could potentially cost three times as much as the autogolous procedure. There apparently was no articulated standard within GHP itself as to what was allowed under the policy, as Mansheim in the space of less than two months was not consistent in applying his own policy.

Mansheim stated that though he had approved allogeneic stem cell treatments for some patients with non-Hodgkins lymphoma, he had not approved the procedure for those with decedent's specific diagnosis. However, he based this on the wrong diagnosis for decedent. He characterized decedent's disease as "indolent," yet this diagnosis had been incorrect for several months in that the diagnosis had changed from "indolent" to "aggressive" – which prompted the recommendation of the stem cell transplant in the first place.

In response to this decision by GHP, Siade filed a request for a temporary restraining order and injunction,

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[1] The difference between the two procedures is whether a recipient donates his own stem cells or receives them from another living donor. Though labeled by the medical community as "stem cell" transplantation, it is actually the procedure commonly referred to as a bone marrow transplant. The doctors in this case had found a donor.

requiring GHP to cover the procedure. The hearing at which both the TRO and preliminary injunction were heard resulted in an order by the District Court denying the preliminary injunction, requiring a more "fully developed record" before the court could state "with any certainty" the likelihood of success on the merits. It should be noted that the time elapsed between the initial decision by Mansheim, the two levels of administrative review by GHP, and the hearing by the District Court on the preliminary injunction, was about a month.

The parties started the discovery process to provide the District Court that level of certainty. Simultaneously, Siade filed suit in state court against GHP and Mansheim, alleging medical malpractice and intentional infliction of emotional distress. The respondents removed this case to federal court, and after this Court's decision in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004), the suit was amended to bring Siade's claims within ERISA. In addition, Siade had passed away, and Knieriem, the personal representative of the estate, was substituted as Plaintiff.

In that amended Complaint, the estate alleged that GHP breached its fiduciary duty, and requested restitution and surcharge against the respondents. GHP filed a Motion to Dismiss, alleging that the damages sought were legal, not equitable. The District Court dismissed the Complaint. The Eighth Circuit affirmed.

REASON FOR GRANTING THE PETITION

REVIEW IS NECESSARY IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE COURTS OF APPEAL AND THIS COURT AS TO THE AVAILABILITY OF MAKE-WHOLE RELIEF AGAINST A BREACHING FIDUCIARY PURSUANT TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT ("ERISA")

The Court of Appeals in its opinion below expanded this Court's previous opinions beyond their permissible reach, finding that suits against fiduciaries and non-fiduciaries under ERISA have the same standard. The court below unnecessarily expanded this Court's decisions in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), to limit ERISA claims against fiduciaries. This issue arises out of what the term "equitable" means in 29 U.S.C. § 1132(a)(3)(B) in the context of the other provisions of ERISA that recognize the special role of fiduciaries.

1. The problem the Petitioner faced here is that within the confines of ERISA, 29 U.S.C. § 1132(a)(3)(B) is the only avenue available for the remedy sought. Relief under 29 U.S.C. § 1132(a)(1) is only available to seek current obligations of an ERISA-governed plan, while courts have limited 29 U.S.C. § 1132(a)(2) to suits brought on behalf of the plan. If there is no relief available under section a(3)(B), then Petitioner has no recourse available for make-whole relief. It does not overstate the case by much to say that without finding this relief available, the plan administrator (who was also the insurer, and had a financial stake in the decision) could allow beneficiaries to die in order to avoid paying claims.

This make-whole relief is a goal consistently espoused by the United States Department of Labor, the agency responsible for enforcing ERISA. In its *Brief for the United States as Amicus Curiae* in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), the United States succinctly made the case why the Court of Appeals below incorrectly interpreted this Court's precedents:

> After *Great West*, the government has taken the position in several cases pending in the courts of appeal that Section 502(a)(3) allows at least some forms of "make-whole" relief against a breaching fiduciary in light of the general availability of such relief in equity at the time of the divided bench. Historically, a beneficiary's claim against a trustee for a breach of trust was typically remedied *exclusively* in the courts of equity because the beneficiary had only an equitable, not a legal interest, in the trust and its assets. See Restatement (Second) of the Law of Trusts §§ 2 cmts. e and f, 197 (1959). A beneficiary therefore could maintain a suit in equity to obtain various forms of relief, including to compel the trustee to perform his duties as trustee, to enjoin the trustee from committing a breach, and "to compel the trustee to redress a breach of trust." *Id.* § 199(a)-(c). The trustee's liability in the event of a breach gave rise to various alternative remedies, including a remedy that "will put [the beneficiary] in the position in which he would have been if the trustee had not committed the breach of trust." *Id.* § 205 & cmt. a. A monetary recovery in those circumstances did not require a showing of unjust enrichment. See, *e.g.*, *id.* § 205, cmt. c; *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999); *Bowerman v. Wal-Mart Stores, Inc.*, 266 F.3d 574 (7th Cir.

> 2000); see generally George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* 861 at 3-4 (rev. 2d ed. 1995). Neither *Great West* nor *Mertens* supports the proposition that Congress intended that the courts should ignore that settled trust law understanding dating from the days of the divided bench.

Brief of the United States at 27-8n.13.

Under the law, this make-whole relief is available. If this make-whole relief is not available, Petitioner has no remedy in this case.

This is not just of passing interest. The circuit courts have consistently expanded this Court's decisions on non-fiduciaries to include within their ambit suits against fiduciaries. *See, e.g., Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1010-11 (9th Cir. 1998). As the United States noted above, this is simply not the law, and this Court needs to correct the errant interpretation of this Court's opinions.

This is not, in addition, an invitation to "open the floodgates" of ERISA litigation. What Petitioner seeks here is not compensatory damages, or extracontractual damages. Instead, it is a carefully limited remedy that places no additional burden on the financial resources of a plan, nor should make plans more expensive or limit access to them by participants or employers. This suit merely seeks the equitable jurisdiction of this Court to correct the error made by the plan administrator; the only cost to the plan would be the outlay that the plan would have made if the plan administrator had not breached its fiduciary duty.

2. Does the lack of the decedent or estate incurring the medical charges eliminate liability, as the court below

believed? It is important to emphasize a distinction the court below failed to recognize: the *amount* at issue remains a matter of evidence; but the *qualitative* nature of that amount – the medical bills that would have been incurred for the procedure – is a liquidated claim and therefore, under the law, a fixed amount.

If that is true, then does the fact that the money was never actually transferred make a difference in a proceeding brought in equity? No. The Court of Appeals could cite no law for this proposition, and with good reason – there is none. In fact, it is directly contrary to both the Court of Appeals and this Court's decision in *Varity Corp. v. Howe*, 36 F.3d 746 (8th Cir. 1994), *aff'd*, 516 U.S. 489 (1996).

In *Varity*, a plan administrator breached its fiduciary duty by knowingly switching participants into an insolvent plan. The district court awarded compensatory damages and, more importantly, damages in restitution for benefits owed but not paid. The Court of Appeals reversed the compensatory damages, but affirmed the damages in restitution, finding that such damages were permissible under section a(3)(B). That decision was affirmed by this Court. In *Varity*, the beneficiaries had not yet "incurred" the amount owed either; at least not any more so than the estate's position here.

The bottom line is that the money either was owed or not. The only reason the decedent did not "incur" the cost was that the plan wrongfully refused to pay for it. To use this as the lone justification for denying recovery when decedent was in a desperate battle to force the plan to pay for the procedure, only to die from not having this procedure, is unconscionable. The decedent, the doctors, and even (initially) the plan had all approved the procedure

and its cost. Moreover, such a recovery could have no financial detriment to the plan, as this is a cost that, by the facts that must be deemed to be true, the plan should have paid anyway.

3. Does it matter if the funds owed to the estate were co-mingled with other plan assets? In equity, if the trustee was the wrongdoer – a situation identified in the law as *trustee ex malefico* – then a court is permitted to search for the funds of what would ordinarily be a constructive trust, even if those funds were commingled with others. For example, in *Brown v. New York Life Ins. Co.*, 152 F.2d 246 (9th Cir. 1945), a bank officer considered a fiduciary stole funds from his employer, deposited them in a general bank account, and out of that general bank account purchased a life insurance policy. After the bank officer died, an assignee of the bank attempted to seize the life insurance proceeds through a constructive trust. The court agreed a constructive trust had been created, which was not dissipated just because the funds had been co-mingled with funds that had been legitimately acquired. No matter how the subsequent transactions are characterized, the court held, a wrongdoing trustee could not avoid the creation of the trust by co-mingling funds; such a result was simply not equitable.

The situation is no different here. GHP claims it can escape its wrongdoing simply because it commingled the funds. As alleged in the Second Amended Complaint below, GHP took actions that were knowingly wrong, and continues to disclaim liability because of those same wrongful acts. Equity has never allowed this to occur; in fact, the chancery courts were created to prevent such abuses.

In *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000), this Court allowed the restitution of funds that had been co-mingled. In *Harris Trust*, this Court found that both restitution and surcharge were allowed to recover funds that a non-fiduciary held after engaging in prohibited transactions. Moreover, the dispute was over cash; there was no allegation that the funds had been segregated into a separate account, yet this Court specifically held a constructive trust existed and could be used for purposes of restitution and surcharge.

CONCLUSION

For the foregoing reason, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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434 F.3d 1058

United States Court of Appeals, Eighth Circuit.
David KNIERIEM, as personal representative of the Estate of Troy Siade, deceased, Appellant,

v.

GROUP HEALTH PLAN, INC.; Bernard Mansheim, Appellees.
No. 05-1139

Submitted: Oct. 12, 2005
Filed: Jan. 19, 2006

Before RILEY, HANSEN, and COLLOTON, Circuit Judges.

RILEY, Circuit Judge.

David Knieriem (Knieriem), as personal representative of the estate of Troy Siade (Siade), appeals the order of the district court[1] dismissing his claim, because the relief sought against Siade's employer-sponsored health care plan was not available under the Employee Retirement Income Security Act of 1974 (ERISA), § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B). We affirm.

I. BACKGROUND

Siade had an employer-sponsored health care plan provided by Group Health Plan, Inc. (GHP). The plan was governed by ERISA. GHP issued the health insurance policy for the plan. In 2001, Siade was diagnosed with non-Hodgkin's lymphoma and sought GHP's pre-approval for

[1] The Honorable Audrey G. Fleissig, United States Magistrate Judge for the United States District Court for the Eastern District of Missouri, presiding by consent of the parties pursuant to 28 U.S.C. § 636(c)(1).

an allogeneic stem cell transplant. GHP denied coverage on the basis the procedure was "investigational and unproven" and therefore excluded under the plan's policy.

In April 2004, following GHP's denial of coverage, Siade filed a lawsuit in Missouri state court seeking damages against GHP and Dr. Bernard Mansheim, Chief Medical Officer of Coventry Health Care, GHP's parent company (collectively, GHP). Siade alleged GHP's wrongful denial of coverage amounted to medical malpractice and intentional infliction of emotional distress under Missouri law. GHP removed the case to federal court based on ERISA preemption. The district court denied Siade's motion to remand, finding the state claims were preempted by ERISA, but granted Siade leave to file an amended complaint to plead a claim under ERISA.

In his amended complaint, Siade[2] requested a jury trial and alleged GHP breached its fiduciary duty by denying coverage. For relief, Siade requested the court "order restitution by defendants to Plaintiff; to award Plaintiff a 'surcharge' as that term was used in equity prior to the fusion of law and equity; to provide compensation to Plaintiff for defendants' breach of fiduciary duty; [and] to award attorney's fees." GHP then moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under ERISA. The district court granted the motion, reasoning "[w]hile Plaintiff has phrased his request as for 'restitution' and a 'surcharge for

[2] Siade passed away shortly after the case was removed. Knieriem was appointed personal representative of Siade's estate. The district court permitted Knieriem to be substituted as plaintiff, and allowed Knieriem to serve as both personal representative and counsel in this action.

breach of a fiduciary duty,' Plaintiff is actually seeking monetary relief, and such relief is not available under ERISA."

On appeal, Knieriem argues the district court erred in dismissing the claim because ERISA allows a monetary award of restitution and a surcharge to the beneficiaries of a decedent when the plan administrator improperly fails to authorize a procedure.

II. DISCUSSION

We review de novo the district court's grant of a motion to dismiss pursuant to Rule 12(b)(6), accepting all factual allegations in the complaint as true and granting every reasonable inference in favor of the nonmovant. *MM & S Fin., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 909 (8th Cir.2004) (citing *Stone Motor Co. v. GMC*, 293 F.3d 456, 464 (8th Cir.2002)). "A motion to dismiss should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts to warrant a grant of relief." *Gilmore v. County of Douglas, Neb.*, 406 F.3d 935, 937 (8th Cir.2005) (citing *Carter v. Arkansas*, 392 F.3d 965, 968 (8th Cir.2004)).

There is no dispute Siade did not receive the allogeneic stem cell transplant. We will assume, as we must in reviewing a dismissal for failure to state a claim, GHP breached its fiduciary duty by denying coverage for the procedure. The question before us is whether the requested relief is available under ERISA.

Knieriem does not deny the relief requested is money damages. Instead, he contends ERISA's roots in the equitable law of trusts allow for monetary damages in the

present case. First, Knieriem argues, as a fiduciary, GHP held the money Siade paid for health benefits in trust. Therefore, recovery is nothing more than the restitution of the funds the fiduciary had an obligation to release. Knieriem's second argument is monetary recovery in the form of a surcharge is available as an equitable remedy when, as here, a trustee has gained personally from wrongful action taken in managing a trust. We disagree.

A. Restitution

As the Supreme Court has oft-iterated, "ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) (internal quotations omitted). The Court similarly has repeated its reluctance "'to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text." *Id.* (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)) (alteration in original). The statute's failure to include certain remedies, as the Court has noted, was not an oversight; rather, "ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* (internal quotations omitted). Vague notions that ERISA's purpose would be defeated if recovery was limited are inadequate to overcome the basic words of the statute. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 943 (8th Cir.1999).

ERISA's civil enforcement provision, found in section 1132, lists six types of civil actions that may be pursued for violations of the statute. *See Russell*, 473 U.S. at 139-40, 105 S.Ct. 3085. The present case was brought pursuant to section 1132(a)(3), which allows a civil action, "by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3)(B). This provision allows an individual plan participant to seek equitable remedies for breach of fiduciary duty in his individual capacity. *See Varity Corp. v. Howe*, 516 U.S. 489, 510-13, 515, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) (finding section 1132(a)(3) allows individual actions for equitable relief for breaches of fiduciary duty). Recovery is limited, however, to "classic" equitable remedies, *Mertens*, 508 U.S. at 257-58, 113 S.Ct. 2063, "such as injunctive, restitutionary, or mandamus relief, and does not extend to compensatory damages," *Kerr*, 184 F.3d at 943.

Restitution can be equitable or compensatory, and the distinction lies in the origin of the award sought. *Id.* at 944. "Restitution seeks to punish the wrongdoer by taking his ill-gotten gains, thus, removing his incentive to perform the wrongful act again. Compensatory damages on the other hand focus on the plaintiff's losses and seek to recover in money the value of the harm done to him." *Id.* (citing 1 Dan B. Dobbs, *Law of Remedies* § 4.1(1), at 369-71 (2d ed.1993)). Therefore, despite the label attached to the remedy in the present case, we must look to the origin of the relief sought to determine whether it is equitable or compensatory.

Knieriem requests monetary relief for the harm suffered. Knieriem states in his brief, "The relief the estate

seeks is the monetary benefit that GHP should have paid for the withheld procedure, including any ancillary profit either GHP or Mansheim made from the denial of the benefit." In his prayer, Knieriem asks for restitution, surcharge, and "compensation to Plaintiff for defendants' breach of fiduciary duty." Knieriem's requested relief is essentially compensatory.

The Supreme Court and this circuit precedent precludes an award of compensatory damages under section 1132(a)(3)(B). *See Mertens*, 508 U.S. at 258-59, 113 S.Ct. 2063, cited in *Kuhl v. Lincoln Nat'l Health Plan of Kansas City, Inc.*, 999 F.2d 298, 304-05 (8th Cir.1993). In *Kuhl*, the insurer delayed authorizing a covered surgical procedure while searching for a network hospital to perform the procedure. *Id.* at 300. By the time the insurer approved surgery, the insured's condition had deteriorated such that surgery was no longer a viable option. The insured died, and his estate filed an action against the insurer in state court alleging, *inter alia*, medical malpractice and emotional distress. *Id.* Following removal based on ERISA preemption, the court found plaintiff's state tort claims were preempted. *Id.* at 301. Pertinent to the case at bar, the court also dismissed a subsequent complaint for breach of fiduciary duty brought pursuant to 29 U.S.C. § 1132(a)(3)(B). *Id.* Citing circuit and Supreme Court precedent, we said,

> We have previously held that monetary damages are not available under section [1132](a)(3)(B)(i). In *Novak* [*v. Andersen Corp.*], we . . . held that an award of monetary damages is a legal remedy, not an equitable one. This interpretation has recently been vindicated by the Supreme Court. After an extensive review of the history of equitable remedies and the statutory language of section

> [1132](a)(3), the Court concluded that damages do not constitute "other equitable relief."

Id. at 304-05 (citing *Mertens*, 508 U.S. at 258-59, 113 S.Ct. 2063; *Novak v. Andersen Corp.*, 962 F.2d 757, 759, 761 (8th Cir.1992)) (internal citations omitted). We concluded the "claim for monetary damages was not cognizable under section [1132](a)(3)(B)(i)." *Id.* at 305.

Knieriem argues his case is distinguishable from *Kuhl*, because in the present case the funds sought were held in trust, are identifiable, and should have been used to pay for the procedure. These distinctions are unavailing. The funds sought are not identifiable, or even known, because Siade never incurred the requested transplant costs. As noted *supra*, whether a remedy is restitutionary or compensatory is determined by the origin of the award. In *Kuhl*, the action for breach of fiduciary duty was brought pursuant to section 1132(a)(3)(B), and he sought monetary recovery from the insurer to compensate the estate for the insurer denying the requested procedure. The remedy sought in this case is premised on the same theory as the remedy sought in *Kuhl*.

Knieriem next argues if Siade were still alive, this action would readily be available under ERISA and, therefore, his death should not give GHP a free pass. The crux of Knieriem's argument is GHP was unjustly enriched by denying the treatment, and the remedy is restitution of the funds to Siade's estate. Knieriem suggests the district court reached the opposite result by misapplying this court's holding in *Geissal v. Moore Medical Corp.*, 338 F.3d 926 (8th Cir.2003).

In *Geissal*, the insurer (the Moore Plan) wrongfully terminated Geissal's health insurance policy on the basis

he was covered by another policy (the TWA Plan). *Id.* at 929. After the Moore Plan terminated coverage, the TWA Plan covered the costs of Geissal's cancer treatment, paying over $86,000 to health care providers, and reimbursing Geissal over $6,500 for out-of-pocket expenses. *Id.* at 929-30. Geissal filed a lawsuit against the Moore Plan seeking compensation for past due benefits, as well as injunctive and equitable relief pursuant to section 1132(a)(1)(B). *Id.* at 930. Geissal died, and his wife, as representative of his estate, was substituted as plaintiff. *Id.* The estate had no obligation to reimburse the TWA Plan, nor did the TWA Plan assert claims against the Moore Plan. *Id.* Nonetheless, the estate sought to recover the amount of benefit payments paid by the TWA Plan, arguing the Moore Plan would have been obligated to pay those expenses but for its wrongful termination of coverage. *Id.* Geissal claimed the estate was entitled to recover those benefit payments to prevent the self-funded Moore Plan from being unjustly enriched. *Id.* at 930-31. The district court denied recovery under section 1132(a)(1)(B) on the basis the plan beneficiary was deceased. *Id.* at 931. However, we concluded the language of the statute, as well as the terms of the Moore Plan, precluded the estate from recovering medical payments paid by a third party – the TWA Plan. *Id.* at 932. The estate had "no claim for legal restitution." *Id.*

Relying on *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. at 209, 122 S.Ct. 708, Geissal argued section 1132(a)(1)(B) allowed the estate to recover the benefits paid by the TWA Plan under a legal restitution theory. *Geissal*, 338 F.3d at 932. We distinguished *Knudson*, reasoning the Court had not addressed recovery for legal restitution under section 1132(a)(1)(B). Rather, in

Knudson, the Court found legal restitution was not recoverable under section 1132(a)(3)(B) because it was not equitable relief. *Id.* We reasoned that under section 1132(a)(1)(B) the Court similarly would limit recovery "to a claim in which the plaintiff can 'show just grounds for recovering money to pay for *some benefit the defendant had received from him.*'" *Id.* (quoting *Knudson*, 534 U.S. at 213, 122 S.Ct. 708) (emphasis in original). We concluded Geissal's estate was not entitled to recover under a legal restitution theory pursuant to section 1132(a)(1)(B), because the Moore Plan was not unjustly enriched due to benefits directly bestowed by Geissal or his estate. *Id.*

Applying our precedent, it is abundantly clear Knieriem seeks a remedy simply not available under ERISA. Unlike *Geissal*, Siade never paid or incurred any covered or potentially covered expenses. Knieriem seeks monetary damages for expenses GHP would have paid, if Siade had received the transplant. Despite the use of semantics, Knieriem seeks monetary relief that does not constitute "other appropriate equitable relief" under section 1132(a)(3)(B). *See Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1010-11 (9th Cir.1998) (finding the money saved by wrongfully denying experimental cancer treatment was not "other appropriate equitable relief" under section 1132(a)(3), because the money did not form the basis of a constructive trust, and was distinguishable from cases where the money taken from pension plans by fiduciaries did form the bases of constructive trusts).

B. Surcharge

As a second basis for recovery, Knieriem argues a surcharge is available as an equitable remedy, providing

monetary recovery when a trustee has gained personally from a wrongful action taken in managing a trust. Knieriem contends this court similarly awarded an insured the disgorged profits of his insurer in *Parke v. First Reliance Standard Life Insurance Co.*, 368 F.3d 999 (8th Cir.2004). Knieriem misapplies *Parke* to the present case.

In *Parke*, plaintiff's monthly long-term disability payments were wrongfully withheld by the insurer. *Id.* at 1003. One question we addressed on appeal was whether prejudgment interest was "other appropriate equitable relief" under section 1132(a)(3)(B) in light of *Knudson*. *Id.* at 1006-07. We determined the relief sought was an "accounting for profits," a limited exception under section 1132(a)(3)(B), allowing legal relief to disgorge the profits realized by wrongfully withholding plaintiff's property. *Id.* at 1008-09 (citing *Knudson*, 534 U.S. at 214 n. 2, 122 S.Ct. 708). As we explained in *Parke*,

> An accounting for profits is one of a category of traditionally restitutionary remedies in equity, and is often invoked in conjunction with a constructive trust. A constructive trust is imposed when a defendant has possession of particular funds or property that in good conscience belong to the plaintiff. *The plaintiff must specifically identify the particular funds or property in order to obtain the constructive trust; it is not enough that the defendant merely owes the plaintiff some money.*

Id. at 1008 (citations omitted) (emphasis added).

Siade did not receive the requested transplant and never incurred any related medical or hospital expenses, i.e., benefits payable. Consequently, GHP holds no readily identifiable funds or property belonging to Siade's estate to

form the basis of a constructive trust. The accounting for profits exception in *Parke* (interest on withheld benefits payable) has no application in the present case.

III. CONCLUSION

Merely re-labeling the relief sought as "restitution" or "surcharge" does not alter the nature of a remedy from monetary to equitable. In the present case, Knieriem seeks money damages which are unavailable under section 1132(a)(3)(B) of ERISA. Thus, we affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DAVID KNIERIEM, as personal representative of the estate of TROY SIADE, deceased,	)	
Plaintiff,	)	
vs.	)	Case No. 4:04CV00415 AGF
GROUP HEALTH PLAN, INC., and BERNARD MANSHEIM,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' motion to dismiss Plaintiff's second amended complaint for failure to state a claim. For the reasons set forth below, Defendants' motion shall be granted.

BACKGROUND

Troy Siade, now deceased, was an insured of Defendant Group Health Plan, Inc. (GHP), pursuant to a health insurance plan (Plan) provided by his employer. It is undisputed that the Plan is an employee benefits plan under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. (ERISA). Mr. Siade, a Missouri resident, was diagnosed with non-Hodgkin's lymphoma in 2001. He was advised by his health care providers that he must undergo an allogenic stem cell transplant if he wanted an opportunity to live. Defendants denied coverage

for this procedure on the basis that it was investigational and unproven, and therefore excluded by the Plan.

On April 5, 2004, Mr. Siade filed this action in state court against GHP, a Missouri corporation; and Dr. Bernard Mansheim, the Chief Medical Officer of GHP's parent corporation. Mr. Siade claimed that Defendants alleged wrongful denial of coverage and knowledge that Mr. Siade did not have the financial resources to pay for the transplant procedure constituted medical malpractice and intentional infliction of emotional distress under Missouri law. Mr. Siade sought damages under each of these state law torts. Defendants removed the action to this Court under 28 U.S.C. § 1441(b), which permits removal of any civil action of which federal district courts have original jurisdiction under 28 U.S.C. § 1331. Defendants asserted that Mr. Siade's claims arose under federal law because the claims were completely preempted by ERISA.

Mr. Siade filed a motion to remand the case to state court. This Court denied the motion to remand on the ground that Mr. Siade's state court claims were preempted by ERISA. This Court further granted Mr. Siade time to file an amended complaint to assert a claim under ERISA.

On June 30, 2004, the Court was notified that Mr. Siade had passed away due to his lymphoma. David Knieriem subsequently filed a second amended complaint as personal representative of Mr. Siade's estate.[1] The

[1] A hearing was held on the record on November 24, 2004, with Mr. Knieriem and Defendants' counsel participating, at which time Mr. Knieriem affirmatively stated that he has been appointed as personal representative of Mr. Siade's estate, and that he would like the second amended complaint to be construed as incorporating a motion for his substitution as plaintiff, under Federal Rule of Civil Procedure 24(1)(a).

(Continued on following page)

current complaint is brought against both Defendants and requests a jury trial. Plaintiff claims that Mr. Siade needed the stem cell transplant to have had an opportunity for long-term disease-free survival. Plaintiff alleges that the Plan issued by GHP provided coverage for the procedure, and that Defendants had previously approved an almost identical procedure for Mr. Siade. Plaintiff further alleges that Defendants had approved the necessary preliminary work for this procedure, but then denied coverage for the procedure on the basis that it was investigational and unproven and therefore excluded by the policy.

Plaintiff also claims that Dr. Mansheim made the decision to withhold coverage, and that there was no attempt by Defendants to establish whether this decision conformed with the definition of "experimental, investigational, and unproven" under the policy. Plaintiff additionally asserts that GHP has a corporate policy of treating transplants differently than other medical procedures, and that Dr. Mansheim incorrectly withheld approval for the

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In light of Defendants' assertion that they had no objection to this procedure or to allowing the substitution, the Court hereby construes the second amended complaint as incorporating a motion for substitution of Mr. Knieriem as plaintiff and grants same.

The Court further notes that Defendants were granted up to and including December 6, 2004, to file any objections they might have to Mr. Knieriem acting as both plaintiff and as plaintiff's attorney in this matter. No such motion was filed, and Defendants advised the Court by letter that they did not intend to file any motion because they believed they lacked standing. Mr. Knieriem, who as an attorney is an officer of the Court, has represented in open court that he disclosed any potential conflict of interest to the estate beneficiaries and obtained from all beneficiaries written waivers of any conflict. The Court will accept Mr. Knieriem's representations on this matter and permit him to serve as personal representative and counsel.

procedure based on a mischaracterization of Mr. Siade's disease as "indolent." Plaintiff claims that Defendants, acting separately and in concert, breached their fiduciary duty to Mr. Siade, and consequently that Mr. Siade's estate was entitled to relief pursuant to ERISA § 502(a)(3). Plaintiff seeks "restitution," an award of a "surcharge as that term was used in equity prior to the fusion of law and equity," "compensation" for Defendants' breach of their fiduciary duty, and attorney's fees.

DISCUSSION

Section 502(a)(3) provides that a civil action may be brought by an ERISA plan participant "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C.A. § 1132(a)(3).

In support of the motion to dismiss now before the Court, Defendants argue that Plaintiff's request for restitution, a surcharge, and compensation are not claims for "appropriate equitable relief" under § 502(a)(3). Defendants contend that the nature of the relief Plaintiff seeks is monetary, and argue that Plaintiff's complaint should be dismissed because monetary relief is not authorized under § 502(a)(3). In response, Plaintiff argues that equity, and therefore ERISA, allows monetary compensation for a breach of fiduciary duty. Plaintiff contends "the source of this action is by a beneficiary of a trust against that trust" and as such it is an equitable claim. Plaintiff further argues that while compensation can be characterized in different ways, courts have always awarded money as

compensation in equity, and thus that monetary compensation is an "appropriate equitable relief" under ERISA.

In reply, Defendants contend that all relief that could be awarded against a trust in a court of equity does not constitute "equitable relief" within the meaning of § 502(a)(3). Rather, § 502(a)(3) only authorizes those types of relief that were typically available in equity, and that Plaintiff is not seeking relief that was typically available in equity. Defendants reassert that Plaintiff's complaint should be dismissed because Plaintiff seeks money damages, and such a claim is not cognizable under § 502(a)(3).

In ruling on a motion to dismiss, the Court takes all facts alleged in the complaint as true. *Westcott v. Omaha,* 901 F.2d 1486, 1488 (8th Cir. 1990). Further, the Court must construe the allegations in the complaint and all reasonable inferences arising from those facts favorably to plaintiff. *Morton v. Becker,* 793 F.2d 185, 187 (8th Cir. 1986). A motion to dismiss may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Id.*

The term "equitable relief" in § 502(a)(3) refers to "'those categories of relief that were *typically* available in equity.'" *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 210 (2002) (quoting *Mertens v. Hewitt Assocs.,* 598 U.S. 241, 256 (1993)). In determining whether relief sought in an ERISA case is recoverable, a court must look to the substance of the remedy sought rather than the label placed on that remedy by the plaintiff. *Slice v. Sons of Norway,* 34 F.3d 630, 633 (8th Cir. 1994) (although plaintiff labeled relief sought as equitable estoppel, he was essentially seeking money damages which are not available under § 502(a)(3)).

The Eighth Circuit has previously held that claims such as Plaintiff's are essentially claims for money damages and thus not cognizable under § 502(a)(3). *Kuhl v. Lincoln Nat'l Health Plan of Kansas City, Inc.*, 999 F.2d 298, 305 (8th Cir 1993) (en banc) (state tort claims for medical malpractice and intentional infliction of emotional distress arising out of ERISA plan's mishandling of beneficiary's need for heart surgery were preempted by ERISA and could not be recast as claims cognizable under § 502(a)(3) because they were claims for monetary damages); *see also Geissal ex rel. Estate of Geissal v. Moore Med. Corp.*, 338 F.3d 926, 931 & n1 (8th Cir. 2003) (an action for benefits under a different provision of ERISA, survives the beneficiary's death; distinguishing cases involving claims for money damages for the beneficiary's death after the plan denied coverage for a medical procedure the beneficiary could not afford, as "[t]he courts decided that § 1132(a)(1)(B) does not permit a damage action for breach of the plan, only for benefits under the plan.").

Other courts have reached this conclusion too. *See Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1010-11 (9th Cir. 1998) (granting personal representative's request for restitution against insurance company for breach of fiduciary duty by delaying authorization of a potentially life saving procedure would be equivalent to awarding money damages because the only conceivable remedy would be to return the cost of the procedure not given to the decedent, which is the same as providing legal recovery of cost); *Turner v. Fallon Comm. Health Plan, Inc.*, 127 F.3d 196, 198 (1st Cir. 1997) (same).

Nor is Plaintiff's claim saved by invoking the doctrine of a constructive trust. While Plaintiff alleges in his

opposition brief that he is seeking restoration of certain funds, his pleading belies that assertion. As the Court noted in *Knudson,* 534 U.S. at 213-14, such claims are limited to claims to restore to a plaintiff "particular funds or property in the defendant's possession." Plaintiff does not and can not identify any such funds, but rather seeks to impose personal liability upon Defendants. Under controlling Supreme Court precedent, such claims cannot be brought under ERISA. *Id.*

The Court recognizes that this result perhaps leaves Plaintiff with no remedy, but as Justice Ginsburg recently noted in her concurrence opinion in *Aetna Health, Inc. v. Davila,* 124 S.Ct. 2488, 2503 (2004) (Ginsburg, J., concurring), any unfairness is for the Supreme Court or Congress to redress.

CONCLUSION

While Plaintiff has phrased his request as for "restitution" and a "surcharge for breach of a fiduciary duty," Plaintiff is actually seeking monetary relief, and such relief is not available under ERISA.

Accordingly,

IT IS HEREBY ORDERED that Defendants' motion to dismiss is **GRANTED**.

(2)

No. 05-1336

FILED
MAY 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAVID KNIERIEM, as personal representative of the Estate of Troy Siade, deceased,
Petitioner,

v.

GROUP HEALTH PLAN, INC., and BERNARD MANSHEIM,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole question presented for review is whether the district court and the Court of Appeals correctly determined that Siade's Second Amended Complaint fails to state a claim for breach of fiduciary duty under 29 U.S.C. § 1132(a)(3)(B), ERISA § 502(a)(3)(B), in that the restitution and surcharge Siade seeks are legal damages that are not available under ERISA § 502(a)(3).

CORPORATE DISCLOSURE STATEMENT

Respondent Group Health Plan, Inc. furnishes the following corporate disclosure statement. pursuant to Supreme Court Rule 29.6:

Group Health Plan, Inc. is wholly owned by Coventry Health Care, Inc., which is a publicly held company.

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29 U.S.C. § 1132(a)(3) ("ERISA § 502(a)(3)") .... *passim*

Supreme Court Rule 10 10

IN THE

Supreme Court of the United States

No. 05-1336

DAVID KNIERIEM, as personal representative of the Estate of Troy Siade, deceased,

Petitioner,

v.

GROUP HEALTH PLAN, INC., and BERNARD MANSHEIM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Siade was an insured of Group Health Plan, Inc. ("GHP") pursuant to a health benefit plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"). Siade requested GHP to pre-certify coverage for an allogeneic stem cell transplant for the treatment of his non-Hodgkin's Lymphoma (the "Experimental procedure"). GHP denied this request on the grounds that the allogeneic stem cell transplant for the treatment of Siade's condition is investigational and unproven and is therefore excluded from coverage by Siade's Certificate of Coverage.

Siade brought a lawsuit against GHP in the Circuit Court of St. Louis County, seeking a temporary restraining order and

injunction requiring GHP to cover the Experimental procedure. GHP removed the lawsuit to the U.S. District Court for the Eastern District of Missouri based upon ERISA preemption. The parties engaged in discovery and briefing on Siade's motion for preliminary injunction. The district court thereafter conducted an evidentiary hearing and denied Siade's motion for preliminary injunction.

Siade then filed the instant lawsuit in the Circuit Court of the City of St. Louis, asserting state law claims of medical malpractice and intentional infliction of emotional distress against GHP and Dr. Bernard Mansheim.[1] GHP removed the instant lawsuit to the U.S. District Court for the Eastern District of Missouri, again based on ERISA preemption. The district court issued an Order denying Siade's motion to remand, holding that Siade's claim for benefits is governed by ERISA. The Order required Siade to re-file his complaint, if at all, under ERISA. In the interim, Siade died, and his personal representative David Knieriem has been substituted as plaintiff in this lawsuit.[2]

Siade filed a Second Amended Complaint. His sole claim is breach of fiduciary duty under 29 U.S.C. § 1132(a)(3), ERISA § 502(a)(3)[3] based upon GHP's failure to provide coverage for the Experimental procedure. Siade seeks "restitution," a "surcharge," and "compensation for GHP's breach of fiduciary duty."

By Order dated December 6, 2004, the district court granted GHP's motion to dismiss the Second Amended Com-

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[1] Dr. Mansheim is the Chief Medical Officer of Coventry Health Care Inc., GHP's parent company. Respondents are collectively referred to herein as "GHP."

[2] For ease of reference, Plaintiff David Knieriem, as personal representative of the estate of Troy Siade, will be referred to herein as "Siade."

[3] ERISA § 502(a) refers to 29 U.S.C. § 1132(a), and the two citations are used interchangeably.

plaint on the grounds that the monetary relief Siade requested is not available under ERISA § 502(a)(3). App. 12. The court held, "While Plaintiff has phrased his request as for 'restitution' and a 'surcharge for breach of a fiduciary duty,' Plaintiff is actually seeking monetary relief, and such relief is not available under ERISA." *Id.* p. 18.

The United States Court of Appeals for the Eighth Circuit affirmed the district court's order of dismissal. Like the district court, the Court of Appeals held: "Merely re-labeling the relief sought as 'restitution' or 'surcharge' does not alter the nature of a remedy from monetary to equitable. In the present case, Knieriem seeks money damages which are unavailable under section 1132(a)(3)(B) of ERISA." App. 11.

SUMMARY OF ARGUMENT

Siade does not advance any compelling reason why this Court should grant certiorari in this case. The sole basis for Siade's writ of certiorari is his mistaken assertion that the Court of Appeals misapplied prior decisions of this Court. The alleged misapplication of a properly stated rule of law, however, is not a compelling reason for this Court to grant a writ of certiorari. Moreover, the Court of Appeals properly applied the governing legal principles laid down by this Court. Each of Siade's arguments has already been considered and squarely rejected by this Court.

At bottom, the writ rests upon Siade's plea that ERISA must make him whole for an alleged wrong. This thesis, however, is directly contrary to this Court's oft repeated holding that ERISA does not guarantee make-whole relief.

Moreover, Siade ignores the fact that ERISA does provide relief for a beneficiary seeking plan benefits—and injunctive relief—under ERISA § 502(a)(1)(B). Siade pursued this relief, but his claim for preliminary injunction under § 502(a)(1)(B) was denied. Now he asks the Court to create a

new remedy under ERISA § 502(a)(3) on the sole grounds that he must be allowed to recover something.

Siade's claim fails because this Court has repeatedly refused to read into ERISA remedies other than those specifically provided by Congress. And this Court has firmly established that claims for monetary damages, just like Siade's claims here, are not available under ERISA § 502(a)(3). *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). These holdings are consistent with the statutory scheme created in ERISA.

Because Siade does not present any novel issues for this Court's review, the petition for writ of certiorari should be denied.

ARGUMENT

I. THE COURT SHOULD DENY THE PETITION BECAUSE THE COURT OF APPEALS' DECISION RESTS ON CONTROLLING DECISIONS OF THIS COURT.

A. This Court Has Repeatedly Held That ERISA Does Not Guarantee The Availability Of Make-Whole Relief.

Siade's argument centers upon his conclusory plea that ERISA must make him whole. Siade essentially acknowledges that ERISA does not provide the remedy he seeks, but he asserts that it *should* provide him a remedy. Pet. at 5. Siade urges the Court to read into § 502(a)(3)(B) a remedy that Congress did not provide, because "[i]f there is no relief available under section a(3)(B), then Petitioner has no recourse available for make-whole relief." *Id.*

This Court, however, has repeatedly rejected the contention that ERISA must provide a remedy for every alleged wrong.

To the contrary, this Court has established that ERISA only provides the remedies that Congress specifically authorized:

> We have observed repeatedly that ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." We have therefore been especially "reluctant to tamper with [the] enforcement scheme" embodied in the statute by extending remedies not specifically authorized by its text. Indeed, we have noted that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'"
>
> * * *
>
> In the end, petitioners ask us to interpret § 502(a)(3) so as to prevent them "from being deprived of any remedy under circumstances where such a result clearly would be inconsistent with a primary purpose of ERISA," namely, the enforcement of the terms of a plan. . . .
>
> We need not decide these issues because, as we explained in *Mertens*, . . . "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration."

Great-West, 534 U.S. at 209, 220 (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985), and *Mertens*, 508 U.S. at 251, 254, 261).

This Court has firmly established that it is not the province of the courts to read into the statute remedies that Congress chose not to include. Because this Court has already rejected the argument that ERISA provides "make-whole" relief in every case, Siade has not presented any novel or compelling issue for this Court's review.

B. As This Court Has Recognized, ERISA Allows A Claim For Recovery Of Plan Benefits.

Siade urges this Court to create a new remedy under ERISA § 1132(a)(3)(B) because "within the confines of ERISA, 29 U.S.C. § 1132(a)(3)(B) is the only avenue available for the remedy sought." Pet. at 5. However, Siade ignores the fact that he did have a remedy under ERISA, a remedy that he pursued—a suit for injunctive relief to attempt to obtain the requested coverage.

Under ERISA, a plan beneficiary denied plan benefits has the right to bring an action to recover benefits under the plan, pursuant to ERISA § 502(a)(1)(B). Indeed, the primary remedy contemplated by ERISA is the provision of *benefits* under an employee benefit plan—not, as Siade seeks here, the payment of money as compensation for benefits that he did not receive.

Before commencing the instant action, Siade filed a suit for injunctive and declaratory relief seeking an order compelling GHP to pay for the Experimental procedure. Pet. at 3-4. Following an evidentiary hearing, the district court denied Siade's motion for preliminary injunction on the grounds that he failed to demonstrate a likelihood of success on the merits. *Id.*

The injunctive relief sought by Siade in his previous lawsuit is precisely the remedy contemplated by ERISA for a beneficiary seeking plan benefits. As this Court has recognized, "Upon the denial of benefits, [beneficiaries] could have paid for the treatment themselves and then sought reimbursement through a § 502(a)(1)(B) action, or sought a preliminary injunction." *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 211-12 (2004) (noting cases where federal courts have issued such preliminary injunctions).

The fact that the district court ruled against Siade on his motion for injunctive relief does not mean that Siade did not

have an available remedy. And the availability of this relief under ERISA § 502(a)(1) contradicts Siade's overstated assertion that the plan administrator "could allow beneficiaries to die in order to avoid paying claims." Pet. at 5. Siade does not assert any compelling reason for this Court to grant certiorari. Siade's belief that ERISA must grant him additional relief beyond that which Congress provided does not present any issue for review by this Court.

C. This Court Has Repeatedly Held That ERISA Does Not Provide All Relief That A Court Of Equity Could Award.

This Court has also rejected Siade's argument that the "equitable" relief available under ERISA § 502(a)(3) encompasses all relief that a court in equity traditionally had jurisdiction to award. In both *Mertens* and *Great-West*, the Court rejected Siade's argument that "appropriate equitable relief" includes all relief that could be granted by a court of equity for breach of trust:

> As we explained in *Mertens*, "'[e]quitable' relief must mean *something* less than *all* relief." Thus, in *Mertens* we rejected a reading of the statute that would extend the relief obtainable under § 502(a)(3) to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority). Such a reading, we said, would "limit the relief *not at all*" and "render the modifier ['equitable'] superfluous." Instead, we held that the term "equitable relief" in § 502(a)(3) must refer to "those categories of relief that were *typically* available in equity . . ."

Great-West, 534 U.S. at 209-10 (quoting *Mertens*, 508 U.S. at 256-58).

Siade asserts, with no legal support, that this Court's holdings in *Great-West* and *Mertens* only apply to suits against non-fiduciaries, and do not apply in a suit against an alleged fiduciary. Pet. at 5, 7. However, there is nothing in *Great-West* or *Mertens* to so limit the holding in either case. Both of those cases interpret the scope of "equitable" relief recoverable under ERISA § 502(a)(3), and neither case depends upon whether the defendant is a fiduciary. Because § 502(a)(3) applies to suits brought against any person—fiduciary or non-fiduciary—there is no grounds for the distinction that Siade attempts to make. *See Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 246 (2000) (§ 502(a)(3) allows appropriate equitable relief without regard to which party may be a defendant in the case).

The *amicus* brief filed by the United States in *Aetna Health*—which is the only authority Siade cites for his argument that an ERISA beneficiary should be able to recover under § 502(a)(3) all relief that was available against a trustee in a court of equity—is not controlling law. Pet. at 6-7. This Court expressly declined to address the argument made by the United States in *Aetna Health* since the petitioner in that case did not bring a claim under § 502(a)(3). *See Aetna Health*, 542 U.S. at 221, fn 7. But the United States as amicus made this exact same argument in both *Great-West* and *Mertens*, and this Court explicitly rejected the argument in both cases. *See Great-West*, 534 U.S. at 219; *Mertens*, 508 U.S. at 255-56.

Siade asks this Court to engraft onto the Court's established interpretation of equitable relief under § 502(a)(3) a new rule to apply only when the defendant is a fiduciary. There is nothing in § 502(a)(3) or this Court's precedents to support such a double-standard. As this Court has twice held, § 502(a)(3) does not authorize money damages just because a court sitting in equity is authorized to award money damages against a fiduciary for breach of trust. These holdings are

controlling, and this case presents no new issues for this Court's review.

D. This Court's Prior Precedents Compel The Conclusion That The Relief Siade Seeks Is Not Equitable Relief.

Siade has not asserted a claim for equitable relief. A request for the payment of benefits that a beneficiary did not receive is not equitable relief, even when a petitioner has styled it as a request for "restitution." In *Great-West*, this Court held that "not all relief falling under the rubric of restitution" qualifies as "equitable relief" under ERISA § 502(a)(3). 534 U.S. at 212. The Court held that for restitution to be equitable relief, the funds sought must be clearly traceable to particular funds or property belonging to the plaintiff:

> [A] plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. . . . Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Great-West, 534 U.S. at 213-214 (citations omitted). When a petitioner simply claims a contractual entitlement to benefits, but cannot identify particular funds in the defendant's possession, the restitution is therefore legal restitution. *Id.*

In this case, both the district court and Court of Appeals, relying on *Great-West*, held that Siade cannot identify any specific funds to support a claim for equitable restitution. The district court found that Siade's claim for damages does not seek to restore to Siade any "'particular funds or property

in the defendant's possession.' Plaintiff does not and can not identify any such funds, but rather seeks to impose personal liability upon Defendants." App. 18. The Court of Appeals affirmed: "GHP holds no readily identifiable funds or property belonging to Siade's estate to form the basis of a constructive trust." App. 10-11.

The courts below properly applied *Great-West* to the facts of this case and determined that the monetary relief that Siade seeks is not equitable restitution. To the extent Siade alleges that the courts below misapplied the law established by *Great-West*, he has not presented an issue that warrants a grant of certiorari. *See* Sup. Ct. Rule 10. Moreover, he is simply incorrect.

Siade's reliance on *Varity Corp. v. Howe*, 36 F.3d 746 (8th Cir. 1994), *aff'd*, 516 U.S. 489 (1996) is misplaced. Siade relies upon the decision of the Court of Appeals, which awarded monetary damages under § 502(a)(3). *See* Pet. at 8. While this Court affirmed the Court of Appeals' basic holding that ERISA authorizes a lawsuit for individualized equitable relief—a legal proposition not disputed by either party in the instant lawsuit—this Court did not address whether the damages awarded by the lower court were in fact equitable relief. To the contrary, the Court expressly stated that the monetary relief awarded by the lower court "is not at issue here." 516 U.S. at 495. To the extent that the Court of Appeals in *Varity* determined that monetary benefits could be awarded as equitable relief under § 502(a)(3), that holding did not survive this Court's subsequent decision in *Great-West*.

Siade's argument that it does not matter whether there is an identifiable amount of funds is directly contrary to the holding in *Great-West*. The distinction Siade attempts to draw between the amount of funds and the qualitative nature of the funds is not supported by any legal authority. Pet. at 8. To the contrary, the very nature of a constructive trust presumes that there is a *specific* sum of money belonging to

plaintiff that can clearly be traced to particular funds in defendant's possession. *Great-West*, 534 U.S. at 213-14.

This Court recently re-affirmed the holding of *Great-West* that equitable restitution only lies when the plaintiff seeks "to impose a constructive trust or equitable lien on 'particular funds or property in the defendant's possession.'" *Sereboff v. Mid Atlantic Medical Services, Inc.*, 2006 WL 1310754 at *4 (U.S. May 15, 2006). In *Sereboff*, this Court allowed a claim under § 502(a)(3)(B) based upon an equitable lien arising "by agreement" of the parties, which is a "different species of relief" from the equitable restitution that Siade seeks here. *Id.* at *6.

Finally, Siade's argument that he is entitled to relief despite an alleged co-mingling of funds rests upon a faulty premise; it assumes that identifiable funds ever existed. Pet. at 9-10. In both cases cited by Siade, the issue was whether a party lost an action for restitution when defendant had possession of an identifiable sum of money that was then co-mingled with defendant's other funds. *See Brown v. New York Life Ins. Co.*, 152 F.2d 246 (9th Cir. 1945); *Harris Trust & Savings Bank*, 530 U.S. 238. But here, where the lower courts have already held that GHP never had possession of any identifiable funds belonging to Siade, the issue of co-mingling is irrelevant.

CONCLUSION

Wherefore, Respondents respectfully request that this Court deny the petition for writ of certiorari. Siade is simply seeking to rehash principles of law soundly settled by this Court. Siade does not present any new legal issues or advance any compelling reason why this Court should grant certiorari in this case.

Respectfully submitted,

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